

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

Shorewood, Wisconsin

SHOREWOOD HEIGHTS HEALTH CARE
CENTER D/B/A BEVERLY
ENTERPRISES-WISCONSIN¹

Employer

and

Case 30-RC-6088

DISTRICT 1199W/UNITED
PROFESSIONALS FOR QUALITY
HEALTH CARE affiliated with
SERVICE EMPLOYEES INTERNATIONAL
UNION, AFL-CIO, CLC²

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,³ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

¹ The correct legal name of the Employer appears as amended at hearing.

² The correct legal name of the Petitioner appears as amended at hearing.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time licensed practical nurses employed by the Employer at its Shorewood, Wisconsin facility; but excluding office clerical employees, service and maintenance employees, professional employees, guards, and supervisors as defined in the Act.

BACKGROUND AND ISSUE:

The Employer operates a 215 bed nursing home facility in Shorewood, Wisconsin. Petitioner seeks a bargaining unit of all full-time and regular part-time licensed practical nurses (LPNs) employed at the Employer's facility. The Employer's sole contention is that the petition should be dismissed inasmuch as all of its LPNs are statutory supervisors. There are approximately twenty-six employees in the petitioned for unit. There exists no history of collective bargaining for any of the LPNs. The Employer's certified nursing assistants (CNAs) are represented by the Union in what appears to be an overall service and maintenance unit.⁴ The CNAs are currently covered by a collective bargaining agreement.

FACTS:

The Facility:

³ Timely briefs from the Employer and Petitioner have been received and duly considered.

⁴ The parties stipulated that if the Employer's contention is denied, the unit described in paragraph 5 is an appropriate unit for purposes of collective bargaining.

The Employer operates a five floor nursing home facility which is comprised of eight departments: nursing, therapy, dietary, activities, social services, housekeeping, laundry, and maintenance. The facility is divided into four nursing units which are located on four separate floors. The first floor consists of a Medicare unit. The second floor consists of a special care unit. The third floor consists of a medically complex unit. The fourth floor consists of a behavior/psych unit. The nursing home operates seven days a week on a twenty-four hour basis.

The Hierarchy:

Duane Floyd, the Executive Director, is responsible for the entire operation of the facility. Peggy Napientek, the Director of Nursing (DON), oversees the nursing department. There is also a second shift manager and third shift manager who assume this role during their respective shifts. In addition, an Assistant Director of Nursing (ADON) is available on each resident floor during the first shift.⁵ The ADONs are responsible for the RNs and LPNs on their respective floors. There are approximately twenty-four RNs, twenty-six LPNs, and eighty-two CNAs employed in the nursing department.

The facility's current management team has been in place for only about five weeks. Maria Ponce previously served as the DON. Nancy (last name unknown) was the former DON's assistant and had various responsibilities throughout the facility. There was also a nurse manager on the second, third, and fourth floors. However, the Employer's regional management team discharged several of these managers after the facility failed to pass the State's verification visit in January 1999.

LPN Eddie Walker, who works as a floater on the first, second, and fourth floors during the third shift, testified that his duties include patient assessment, charting, summaries, and monitoring patient safety. He also testified that there is typically one nurse and one CNA on first floor, one

nurse and two or three CNAs on second floor, one nurse and three CNAs on third floor, and one nurse and one to two CNAs on fourth floor. LPN Joyce Stuart, who works on the second floor during the third shift, likewise testified that her duties include counting narcotics, making rounds, providing patient care, giving medications, making sure security devices are in place, and charting.

The Supervisory Development Training:

In April, May, and June 1998, the Employer provided a total of three 3 hour regional supervisory development training sessions for the DONs, ADONs, RNs, and LPNs employed at its fourteen facilities. Each facility encouraged or required a majority of its employees to attend the training sessions in Milwaukee and Green Bay. The Shorewood facility sent approximately 16 LPNs to the April session, 12 LPNs to the May session, and 11 LPNs to the June session.

According to Floyd, the April training session focused on leadership in the context of the new job descriptions for “charge nurses.”⁶ At this initial session, each “charge nurse” was provided with various handouts, including a job description which listed supervision as one of their duties. This session also covered supervisory development and teamwork. The May training session dealt with specific aspects of being a supervisor including the role of the “charge nurse” in the Employer’s disciplinary process. More specifically, the nurses were told that they had the authority to provide CNAs with verbal counseling, written counseling, and suspensions pending an investigation. The June training session concentrated on performance evaluations, conflict resolution, and supervisory role playing. Upon completion of the three training sessions, each participant was provided with a certificate of participation.

Floyd further testified that the Executive Director, DON, and nurse manager of each facility were subsequently responsible for providing an in-service for all of the RNs and LPNs who did not

⁵ The DON, ADONs, and shift managers are all RNs.

⁶ The Employer considers all RNs and LPNs to be “charge nurses.”

attend the supervisory training. These managers were supposed to discuss what had been covered in the training sessions and then put it into practice at their facility. ADON Patti Cockroft, however, admitted that Ponce failed to implement these supervisory changes at the Shorewood facility. Both Cockroft and LPN Walker testified that LPNs' supervisory authority did not increase after the training sessions.

In fact, Floyd acknowledged that a recent Employer audit had revealed that only about four of the RNs and LPNs had the new job descriptions in their personnel files.⁷ The other RNs and LPNs either had their old job descriptions on file or in some cases no job description. The RNs and LPNs personnel files likewise typically had no record of the individual's participation in the supervisory training sessions.

Napientek later testified she met with the four ADONs and the two shift managers on February 19, 1999 (fifteen days after the representation petition had been filed with the NLRB) to advise them that the LPNs job description had changed. Cockroft added that the managers passed this information along to the LPNs as none of them were present at the meeting. LPN Walker denied being directly informed that his job responsibilities had recently been changed, but did admit that the new job description was placed in a communication book. However, despite the new job descriptions, LPNs continue to be excluded from the Employer's regular department managerial meetings where various problems and patient care issues are discussed.

Hiring Authority:

Napientek testified that LPNs exercise supervisory authority inasmuch as they effectively hire employees. As an example, Napientek described a situation where she refused to hire an applicant because of information that LPN Walker and another LPN provided to her. LPN Walker,

⁷ For example, the Employer introduced into the record a copy of a new job description that Napientek had LPN Joanne Issacson sign when she was hired on December 8, 1998.

however, testified that he was merely asked his opinion about an applicant with whom he had worked at another facility. LPN Walker also testified that he advised Napientek of certain problems that the applicant had experienced at the other facility. But he played no other role in the decision making process. LPN Walker denied being involved in any other hiring decisions.

Assignment of Work:

According to Cockroft, LPNs are also responsible for insuring that CNAs perform their assigned tasks. Cockroft testified that LPNs fill out assignment sheets that indicate what resident rooms each CNA is responsible for, what vital signs they have to take, and which residents they have to shower, feed, and put down for nap.⁸ LPN Walker and LPN Stuart, in contrast, testified that they are provided with assignment sheets that have already been completed by the DON or ADON. Both LPNs then routinely assign the previously determined room assignments to their two CNAs on a rotating basis. Cockroft further testified that LPNs can change the assignment sheets if a CNA has to leave work early or if there is a change in patient's condition. But Cockroft acknowledged that LPNs typically have the same CNA who has been assigned to the resident continue to care for that person unless the CNA is unavailable.

In cases where a CNA is unable to report to work or must leave before the end of their shift, they are required to notify an ADON or shift manager. These same managers are likewise responsible for determining whether a CNA works overtime or whether another CNA will be called in to work. Cockroft testified that LPNs have the authority to modify CNAs' break times.

Disciplinary Authority:

⁸ Cockroft testified that RN managers and unit secretaries also fill out assignment sheets.

Napientek and Cockroft also testified that LPNs have the authority to provide CNAs with verbal or written counseling under the Employer's two step progressive disciplinary policy.⁹ Napientek later qualified her assertion by stating that she requires that two individuals be present whenever discipline is given to a CNA. Cockroft similarly stated that she always either investigated the matter herself or was present whenever any discipline was given to a CNA. LPN Walker later testified that he has authority to verbally counsel a CNA if they are not handling patient care properly. LPN Walker further testified that if a CNA did not modify their behavior after being verbally counseled by him, he would simply notify his manager of the problem. LPN Walker has not disciplined a CNA in his eight years of employment. LPN Stuart next testified that she routinely consults with a manger before attempting to discipline a CNA, but asserted that she could discipline a CNA without talking to a manager. She cited as an example a situation that occurred in December 1998 when she wrote up a CNA because a resident without a security devise had fallen out of bed. After consulting with an RN manager, Stuart was instructed to write up the CNA for endangering the resident's safety inasmuch as she had failed to put a security devise on the resident. It is uncontroverted that LPNs do not have authority to discharge employees.

Employee Evaluations:

In addition, Floyd testified the Employer's corporate policy is that several individuals should have input into a nursing department employee's annual evaluation.¹⁰ Floyd admitted that the Shorewood facility previously failed to follow this practice on a consistent basis and that evaluation were not even conducted in some cases. Napientek later testified that LPNs would henceforth complete standard written evaluations for CNAs. Cockroft added that LPNs on her unit

⁹ Under the Employer's two step disciplinary policy, rule infractions coming within category 1 are treated as more serious and result in suspension and possible termination after an investigation. Rule infractions covered by category 2 tend to be less serious and may result in progressive discipline.

already provided her with written evaluations of CNAs which she then reviewed and modified if necessary. Cockroft and LPN thereafter jointly gave the evaluation to the CNA. In contrast, LPN Walker recalled only two specific instances where he was asked to evaluate a CNA. He testified that on August 19, 1998 he filled out an evaluation with the assistance of his night supervisor. This evaluation was subsequently modified by Ponce and an overall rating was assigned to the evaluation without any further involvement by him. LPN Stuart likewise testified that she did not evaluate CNAs. She also specifically denied having done an August 17, 1998 evaluation that was in fact previously completed by her RN manager, Diane Umbreit.

With regard to probationary CNAs, Napientek testified that LPNs should complete thirty, sixty, and ninety day evaluations of probationary CNAs which would then be relied upon by the DON to determine whether the CNA passed her probationary period. Napientek's testimony, however, appeared to describe her experience at a prior facility and not the Shorewood facility. In addition, the record does not reflect that any current LPNs have ever completed probationary evaluations.

ANALYSIS

Section 2(11) of the Act defines a supervisor as follows:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

This Section is read disjunctively so that the possession of any one of the indicia makes the individual a statutory supervisor when the exercise requires the use of independent judgment.

Queen Mary, 317 NLRB 1303 (1995). The burden of establishing supervisory status is on the party

¹⁰ These evaluations do not have any impact on a CNA's pay as they are covered by a collective bargaining agreement.

seeking to exclude an individual as a supervisor. *Bennett Industries, Inc.*, 313 NLRB 1363 (1994). Moreover, mere assertions of authority are not sufficient to establish supervisory status. *Chevron U.S.A.*, 309 NLRB 59 (1992).

LPNs do not have the authority to hire or effectively recommend such action. While it has been established that at least one LPN provided the DON with his opinion about an applicant with whom he had worked at another facility, there is no evidence that the LPN played any role in the interviewing process. The fact that the LPN relayed to the DON what he had observed and/or heard about the applicant does not vest him with supervisory authority. *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989).

LPNs also do not assign or responsibly direct employees in the interest of the Employer. The record establishes that LPNs are given assignment sheets at the beginning of their shift which detail what care each resident requires on a given day. The LPNs then divide up the residents' rooms on a rotating basis without exercising any discretion. Although LPNs can modify assignment sheets and break times, this is only done on a limited basis. In similar cases, the Board has consistently found that such assignment of work is routine and does not require independent judgment so as to transfer an LPN into a statutory supervisor. *Evangeline of Natchitoches*, 323 NLRB No. 25 (1997); *Providence Hospital*, 320 NLRB 717 (1996).

Similarly, LPNs do not have any authority to independently discipline or discharge employees. It is clear that LPNs simply provide infrequent verbal or written counseling to CNAs when the latter fail to provide adequate patient care. There is no concrete evidence that LPNs in this regard do anything other than report incidents of unacceptable work performance related to patient care. Nor has it been established that LPNs recommend discipline or that their reports automatically result in discipline being meted out. As the Board has previously found, "authority to

However, evaluations may influence promotions and discipline.

give employees oral warnings and also to write up warnings on forms retained in the employee's personnel file is typical in cases involving nursing-home charge nurses" *Ten Broeck Commons*, 320 NLRB 806, 812 (1996). Significantly, LPNs have not been shown to issue any disciplinary action without first consulting and securing the approval of an ADON or shift manager. If the manager subsequently determines that discipline is warranted, the LPN does not have the authority to discipline a CNA without a manager being present. The record is silent as to the circumstances surrounding the discipline that was introduced as Employer Exhibit 7. Many of these disciplinary actions, however, are signed by an RN manager and/or make reference to the fact that the LPN consulted with a manager prior to disciplining the CNA. Thus, the record is clear that LPNs do not exercise independent judgment in implementing discipline so as to confer supervisory status on them.

Moreover, in performing evaluations, LPNs have merely served in a reportorial function on an irregular basis. The evaluations which LPNs are sometimes asked to complete are always reviewed by a RN manager and oftentimes modified to more accurately reflect the manager's view of the CNA's performance. LPNs are not responsible for giving CNAs an overall rating on their evaluations. Both LPNs also testified that they have never met with a CNA to discuss their evaluation. In any event, most of the CNAs' terms and conditions of employment are unaffected by the evaluations inasmuch as they are set forth in the collective bargaining agreement.

While Napientek also testified that LPNs should complete thirty, sixty, and ninety day evaluations of probationary CNAs which would then be relied upon by the DON to determine whether the CNA passed her probationary period, her testimony appeared to be describing the practice at her previous facility. The record does not provide any examples of LPNs actually completing evaluations for probationary CNAs at the Shorewood facility.

The fact that the Employer has provided some of its LPNs with supervisory training is not sufficient to confer the LPNs with supervisory status under Section 2(11) of the Act. This is especially true where the supervisory training was admittedly not provided to all LPNs and did not translate into additional authority for any of the LPNs. Similarly, a job description, without more, does not vest an employee with these supervisory powers. *Chevron U.S.A.*, 309 NLRB 59, 62.

Finally, the record establishes that the ratio of supervisory to nonsupervisory employees in the nursing department would be about 50 to 82 if the LPNs were found to be supervisors. In a recent case, the 7th Circuit Court of Appeals affirmed a Board decision wherein LPNs in a nursing home were found not to be statutory supervisors. The court initially explained that one of the key factors in determining supervisory status is the ratio of supervisory to nonsupervisory employees. The court then specifically held that a ratio of 59 to 90 was inappropriate to confer supervisory status upon the LPNs inasmuch as it would leave nearly forty percent of the workforce outside the protection of the Act. *NLRB v. Grancare, Inc.*, No. 97-3431, 1999 WL 107918 (7th Cir. March 3, 1999). The court's conclusion clearly applies with equal force in the instant case given the highly improbable ratio of supervisors to nonsupervisors.

CONCLUSION

Based upon all the evidence, I conclude that the Employer has not met its burden of establishing that LPNs are supervisors under Section 2(11) of the Act. Accordingly, I find that the LPNs are eligible to vote and direct that an election be conducted for the petitioned for unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this

Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by District 1199W/United Professionals for Quality Health Care affiliated with Service Employees International Union, AFL-CIO, CLC.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to the list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 384 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer shall file with the undersigned, **two** copies of an election eligibility list, containing the **full** names (including first and last names) and addresses of all the eligible voters, and upon receipt, the undersigned shall make the list available to all parties to the election. To speed preliminary checking and the voting process itself, it is requested that the names be alphabetized. **In order to be timely filed, such list must be received in the Regional Office, Suite 700, Henry S. Reuss Federal Plaza, 310 West Wisconsin**

Avenue, Milwaukee, Wisconsin 53203 on or before March 17, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. **This request must be received by the Board in Washington by March 24, 1999.**

Signed at Milwaukee, Wisconsin this 10th day of March 1999.

/s/ Philip E. Bloedorn
Philip E. Bloedorn, Regional Director
National Labor Relations Board
Thirtieth Region
Henry S. Reuss Federal Plaza, Suite 700
310 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

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